

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE L. McCOY and DEPARTMENT OF HOUSING & URBAN
DEVELOPMENT, STATE COORDINATOR'S OFFICE, Indianapolis, IN

*Docket No. 98-580; Submitted on the Record;
Issued October 14, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim on the grounds that she was not in the performance of duty under the Federal Employees' Compensation Act.

On September 11, 1997 appellant, then a 50-year-old receptionist/secretary, filed a notice of traumatic injury claim, alleging that on September 8, 1997 she sustained injury to her head, neck, back and hip when she lost her balance and fell at her desk hitting her head on her chair and landing on the floor. By letter dated October 22, 1997, appellant resigned from her position with the employing establishment. In a decision dated November 3, 1997, the Office denied appellant's claim on the grounds that her injury did not occur within the performance of duty as her presence on employing establishment's premises was in direct violation of her suspension.

The Board has duly reviewed the entire case record on appeal and finds that appellant was not in the performance of duty.

In providing for a compensation program for federal employees, Congress did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with her employment; liability does not attach merely upon the existence of an employee/employer relation.¹ Instead, Congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty. The Board has interpreted the phrase "while in the performance of duty" to be the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment." "In the course of employment" deals with the work setting, the locale and the time of injury whereas "arising out of employment" encompasses not only the work setting but also a causal concept, the

¹ *Christine Lawrence*, 36 ECAB 422 (1985); *Minnie M. Heubner*, 2 ECAB 20 (1948).

requirement being that an employment factor caused the injury.² In addressing the issue, the Board stated:

“In the compensation field, to occur in the course of employment, in general, an injury must occur: (1) at the time when the employee may reasonably be said to be engaged in [her] master’s business; (2) at a place where [s]he may reasonably be expected to be in connection with the employment; and (3) while [s]he was reasonably fulfilling the duties of [her] employment or engaged in something incidental thereto.”³

In the present case, appellant has contended that she was within the performance of duty when her injury occurred. However, the employing establishment has indicated that appellant was not within the performance of duty at the time of the incident and was in direct violation of a suspension order while on the premises. The Office concluded that appellant was not within the performance of duty, essentially finding that appellant’s injury was due to misconduct apart from the statutory defenses.

Section 8102(a) of the Act provides in pertinent part, as follows:

“The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty, unless the injury or death is --

(1) caused by willful misconduct of the employee....”⁴

The Board notes that the employing establishment has not alleged and the Office has not applied the statutory defense of willful misconduct in the present case. Rather, the employing establishment alleges that appellant was not within the performance of duty as she was in direct violation of a suspension order while on the premises. Thus, the employing establishment suggests that appellant was engaged in misconduct apart from statutory willful misconduct and therefore was not within the performance of duty. In determining whether the evidence of record establishes misconduct apart from the statutory defense, the Board reviewed Larson’s treatise on workers’ compensation law, sections 31 and 31.11 which provides the following guidelines:

“When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment; and (Emphasis in the original.)

“The clearest violations of instructions delimiting the ultimate job for which [the] claimant is employed is the situation in which the prohibition forbids personal activities during working hours. These activities might in some instances be a

² *Denis F. Rafferty*, 16 ECAB 413 (1965).

³ *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

⁴ 5 U.S.C. § 8102(a)(1).

departure from employment even without the prohibition;⁵ but when they are expressly outlawed, all doubt is removed.”⁶

In this case, appellant was given a “Notice of Decision – Suspension” dated September 4, 1997 on September 5, 1997. The notice indicated that appellant was suspended from work for three-calendar days effective September 8 to 10, 1997 due to a first offense of conduct unbecoming an agency employee. Appellant went to work on September 8, 1997 and her supervisor, William P. Shaw, found her at the front desk of the office at approximately 8:10 a.m. Mr. Shaw told appellant he needed to speak with her when she finished talking with a customer. Mr. Shaw advised appellant that she was suspended and should not be in the office. Appellant initially denied being suspended but recanted when he showed her a copy of the suspension notice. Appellant indicated that she would file a grievance in relation to the suspension and asked questions about whether the suspension was without pay. Mr. Shaw reiterated that appellant should not be in the office and she refused to leave unless the police removed her. Thereafter, the Federal Protective Service (FPS) was called but appellant left the office before the officers arrived. According to the report filed by the recording agent, James J. Alberts, the following occurred: When appellant returned to the office at approximately 9:02 a.m., the FPS officers returned and observed appellant in a conversation on a speaker telephone with what appeared to be someone in the Human Resources department. When the conversation ended, Agent Alberts approached appellant, and she said she did not need an escort and would be leaving.⁷ She then made a sudden move with her right arm and was advised if she made another move like that she would be escorted out in handcuffs. The officers followed appellant to her desk so that she could lock her desk, turn off her computer and get her bag. When appellant appeared to be stalling, Agent Alberts attempted to grasp her carrying bag and appellant became irate. Appellant then “looked at her desk and screamed. She fell onto the ground and continued screaming. [Appellant] screamed for about 3 or 4 minutes.” Agent Alberts asked appellant if she wanted an ambulance and notified the FPS of what had transpired. Appellant did not answer the agent and continued to scream until two coworkers calmed her down. She was transported to the hospital by paramedics.

None of appellant’s coworkers actually witnessed appellant’s fall at her desk as they were not in the office at the time of the incident. However, appellant’s statements concerning the sequence of events on September 8, 1997 are inconsistent and, therefore, not credible. Specifically, appellant told Daniel J. Adams, a coworker, that she was not supposed to be off work and that it was “just a misunderstanding.” She advised Mr. Shaw when he questioned her about being at work, that she had not been suspended until confronted with a copy of the suspension notice. In addition, appellant stated her purpose for being at work on September 8, 1997 was to get information about the suspension and appeal procedure; however, she implied that she was supposed to be at work for a normal workday to both Mr. Shaw and Mr. Adams. The Board notes that appellant was initially notified of the employing establishment’s intent to

⁵ See A. Larson, *The Law of Workers’ Compensation* § 27.31(b) (1997).

⁶ *Id.* at §§ 31 and 31.11 (1997).

⁷ When Agent Alberts arrived, Security Officer Dennis Jones, FPS Agent Mark Lambert and Mr. Shaw were already on the scene.

suspend her on June 24, 1997 and therefore she had ample opportunity before September 8, 1997 to have her questions concerning the proposed suspension answered. Appellant also reported that the agent grabbed her arm rather than her bag and told her he was taking her to the station and then grabbed her bag. To the contrary, Agent Alberts indicated that he told appellant she was not going to the station and therefore had no need to call a lawyer.

In any case, appellant's purpose in being on the premises of the employing establishment was not for the fulfillment of her employment duties. Rather, she was at the work site for personal activities allegedly related to gathering information about filing a grievance in relation to her suspension and getting information concerning pay during the suspension. Since appellant was prohibited from working during her suspension, she should not have been at her desk on September 8, 1997. Moreover, her refusal to leave until after the FPS was called and recalcitrance in leaving while they waited for her to do so demonstrated clear misconduct although it did not rise to the level of statutory willful misconduct. Appellant's actions on September 8, 1997 were outside the course of employment and were not compensable under the Act. Therefore, the Office properly determined that appellant's injury was not within the performance of duty.

The decision of the Office of Workers' Compensation Programs dated November 3, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 14, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member